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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRED SMITH, Commissioner, Alabama Department of Corrections; and W. E. JOHNSON, Warden, Holman Unit,

Petitioners

v.

WAYNE EUGENE RITTER,

Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Did the court of appeals err in expanding federal habeas review to encompass facial attacks on state statutes, so that one to whom a statute is constitutional as applied may have his conviction or sentence set aside based upon how the statute might operate in some other case?

2. Did the court of appeals err in holding that Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), absolutely bar application of the harmless error rule to certain types of sentencing defects in capital cases regardless of the facts and circumstances?

3. Did the court of appeals err in holding that Alabama v. Evans, 103 S.Ct. 1736 (1983) (per curiam), which involved respondent's jointly tried co-defendant and the same issues, was not binding on it in this case?

4. Did the court of appeals err in holding, contrary to the decision of the Alabama Supreme Court, that Alabama's pre-Beck v. Alabama, 447 U.S. 645 (1980), capital sentencing procedures are unconstitutional?

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## OPINIONS BELOW

1. The opinion of the United States District Court for the Southern District of Alabama, denying Respondent's petition for a writ of habeas corpus is reported as Ritter v. Smith, 568 F.Supp. 1499 (S.D. Ala. 1983), and is submitted as Appendix B, hereto.[1]

2. The opinion of the United States Court of Appeals for the Eleventh Circuit, reversing the decision of the district court insofar as it denied a new sentence proceeding, is reported as Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984)(per Johnson, J.). It is submitted as Appendix A, hereto. The order correcting one sentence of the original opinion on rehearing is not yet published, but is submitted as Appendix D, hereto.

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[1]The appendices to this petition are separately bound pursuant to Rule 21.1(k).

## JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was issued on February 27, 1984. See Appendix A, p. 1a, infra, and Appendix C, p. 193a, infra. On April 9, 1984, petitioners' rehearing petition was granted to the extent that one sentence of the opinion was changed for clarification purposes, but the remainder of the opinion and the judgment was left unchanged. See Appendix D, p. 195a, infra.

The jurisdiction of this Court is based on 28 U.S.C. §§1254(1) and 2101(c), the federal appeals court having reversed in part the district court's decision in a civil proceeding brought under 28 U.S.C. §2254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. §2254, which is reproduced as Appendix E, hereto, pp. 197a- 203a, infra.

2. Code of Alabama 1975, §§13-11-1 through 13-11-9, which is reproduced as Appendix F, hereto, pp. 203a - 215a, infra.

3. The Eighth Amendment to the United States Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE[1]

### A. THE CRIME AND CRIME SPREE

On December 1, 1976, respondent Ritter was paroled from an Indiana prison where he had been serving a sentence for armed robbery. (Tr. 217, 293, 338) While in prison, he and another inmate, John Louis Evans, III, agreed that once released they would "jump parole" and go on a cross-country crime spree together. (Tr. 211, 322, 338) They did so, leaving Indianapolis on Christmas Day, 1976. (Tr. 322) In the next two-and-a-half months, Ritter and Evans committed

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[1]The following designations are used herein: "R. ___" refers to the clerk's record in this habeas proceeding; "H.Tr. ___" to the transcript of the evidentiary hearing in the district court on the merits of the habeas petition; and "Tr. ___" to the transcript of respondent's state court trial, which was introduced into evidence at the evidentiary hearing in the district court (H.Tr. 302-03).

more than three dozen violent felonies, including robbery, kidnapping, extortion, and murder, in seven different states (App. 69a); Hopper v. Evans, 456 U.S. 605, 606 (1982).[2] In each of those crimes, Ritter was armed with a loaded, deadly weapon. (App. 98a).

One of their crimes was the robbery and murder of Edward Nassar in Mobile on January 5, 1977. (App. 69a). Ritter and Evans robbed Nassar's Pawn Shop to secure money and more weapons. (Tr. 212-14, 218-21, 324, 339-40) During the robbery, Nassar dropped down behind the store counter and started crawling away. (Tr. 219, 340-41) Evans leaned over the counter and shot Nassar in the back,

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[2]This Court's decision in Hopper v. Evans, supra, involved Ritter's co-defendant. The facts stated in that opinion are equally applicable to this case because they were drawn from the same joint trial and sentence proceeding record. (Tr. 1-371)

while Nassar's seven- and nine-year old daughters watched in horror. (Tr. 101, 113, 244, 324-25, 341) Nassar writhed in agony and died later that day. (Tr. 74, 102, 113, 138) Ritter and Evans committed another robbery while leaving Mobile, and then carried their crime spree to other states. (Tr. 289, 295-97, 342)

The only reason Ritter did not fire the shot that killed Nasser is that Evans was in his line of fire and beat him to it. (App. 97a - 105a). Ritter and Evans had previously discussed the possibility that they might have to kill someone in one of their robberies, and they had agreed to do so if necessary. (App. 99a - 101a, 104a, 110a - 111a, 116a - 117a) Ritter stood ready, willing and able to assist Evans in the killing. (App. 99a - 117a). It was "really simply a matter of logistics that Ritter did not fire his weapon" (App. 107a - 108a) and "the only

reason why he did not [kill Nasser] is that John Evans relieved him of that burden" (App. 117a). As the district court concluded: "[i]n essence, Ritter was not so much a non-triggerman, but was rather an unneeded triggerman." (Id.)

Ritter and Evans were finally captured by F.B.I. agents in Little Rock, Arkansas, on March 7, 1977. The only reason Ritter was captured alive was that the agents surprised him, and upon being captured he expressed disappointment that he had not been killed. (App. 70a - 71a).

### B. RITTER'S COURSE OF CONDUCT AFTER CAPTURE AND IN STATE COURT

Ritter voluntarily confessed to the F.B.I. agents in Arkansas his guilt of the many violent crimes he and Evans had committed, including the robbery-murder of Nassar. (App. 71a) Ritter told the agents

he would have killed Nassar if Evans had not done so. (App. 115a) He also told the agents he planned to seek execution when he returned to Alabama. (App. 72a - 73a) Soon thereafter, Ritter waived extradition and on the flight back to Alabama told a state law enforcement officer that he planned to plead guilty and seek execution. (App. 73a - 75a)

The course of conduct Ritter followed at trial was summarized by the district court as follows:

> Continuously, from the first day he arrived back in Alabama, which was on or before March 11, 1977, throughout his entire trial and sentencing proceedings, petitioner intentionally and stubbornly pursued a course of actively assisting the prosecution in proving beyond a reasonable doubt that he was guilty of the capital offense and that he deserved the death penalty. He did so as early as in his formal interview with Mobile police officers; at the Grand Jury, before whom he insisted on appearing; at arraignment where he entered an oral guilty plea;

> and at trial when he entered a written guilty plea and took the stand to testify against himself. When the jury verdict convicting him of the capital offense and fixing his punishment at death was read, petitioner turned, smiled, and gave a "thumbs up" gesture of approval.

(App. 75a - 76a) (citations deleted).

Ritter voluntarily appeared before the grand jury against the advice of his attorney and freely testified at length about his guilt and desire to be executed. (Tr. 24, 338-47) (App. 99a) Ritter told the grand jury that: he and Evans had made a pact to assist each other in any necessary killings; he would have shot Nassar himself if he had had the chance; if he ever got out he would go back to robbery and would kill if necessary in any future robbery. (Tr. 341-45) (App. 99a - 101a)[3]

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[3]Ritter's grand jury testimony was introduced without objection during the sentence hearing. (Tr. 229-233) (App. 89a)

Ritter was indicted by the Mobile County Grand Jury for the Code of Alabama 1975, §13-11-2(a)(2) capital offense of robbery-intentional killing. (Tr. 20) At arraignment he pleaded guilty, and his guilty plea was accepted. (Tr. 21, 27, 59-60) However, in compliance with Alabama law, the trial court ordered the matter submitted to a jury, anyway. (App. 101a - 102a)

A psychiatric examination revealed that Ritter was "of bright normal intellect," was "competent, rational, and able to stand trial," and thoroughly understood the nature and consequences of his actions. (Tr. 22-3, 28, 57, 259) It also found that Ritter, "sincerely seeks the death sentence, preferring this to a long prison sentence." (Tr. 259)

Ritter and Evans were jointly tried before and convicted by a jury of the capital

offense of robbery-intentional killing. (Tr. 29) During the trial, after the State had presented its evidence, Ritter tendered a written guilty plea which was admitted into evidence and went to the jury. (App. 88a). Ritter then voluntarily took the witness stand, against the advice of his attorney, in order to ensure that he would be convicted and sentenced to death. (Tr. 217-21); (App. 102a - 105a) Ritter's testimony before the trial jury and sentencing judge included the following sworn statements:

> Q: I want you to turn and look at the Jury, if you will, Mr. Ritter, and tell that jury if you had an opportunity, to kill Mr. Nassar, would you have killed him?
>
> A: My gun was loaded, and I would have killed him, yes.
>
> Q: You stood ready to assist your cohort in crime in anyway you could, and that went as far as

shooting Mr. Nassar in the back if you had to do so.

A: Yes. John was in my line of fire, but I was there in case he missed.

Q: And if you walked out of this courtroom here today, or if you were ever allowed to walk out of any courtroom, any penitentiary from now until any time in the future, what profession would you start back into?

A: Armed robbery.

Q: And if you had to kill again, would you do it?

A: If it became necessary, I would.

(Tr. 221) (App. 104a - 105a). Ritter also made it clear to the trial jury and sentencing judge that he wanted a death sentence:

Q: You wish to die by death by electrocution?

A: Yes, I do.

Q: Are you asking this jury to do it for you?

A: I am demanding they do it to me.

. . . .

Q: And you want death by electocution?

A: Yes, I do.

Q: And you don't want this Jury to waste any time in going back there and returning a verdict of guilty and sentencing you to die by electrocution?

A: No.

(Tr. 220-21)

Indeed, Ritter even threatened to get out and harm the jury if he was not sentenced to death:

Q: Mr. Ritter, do you want to say anything to these people sitting in the Jury Box as to what you want them to do when they go back there?

A: Well, I think there are two considerations. First, we did kill Mr. Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We

> did kill him, so, really, the only thing you can come back with is the death penalty. And the other consideration is, if you give me life, or if I got life imprisonment, I could get out in ten or fifteen years, and when I got out, I know where everybody on the Jury lives, and I wouldn't appreciate being in prison for ten or fifteen years, so I think I would have to come after you. That's about it.

(Tr. 219-220) Furthermore, "[a]t the time he threatened the jury, he was smiling or grinning and appeared to be menacing and extremely dangerous." (App. 88a - 89a).

The trial court instructed the jury that it could not convict Ritter of the capital offense unless it found beyond a reasonable doubt that he had possessed "an actual or positive intent to kill." (Tr. 233) (App. 106a). Within fifteen minutes after retiring to deliberate, the jury returned with a verdict convicting Ritter of the capital offense

and "fixing" his sentence at death. Ritter gave a "thumbs up" gesture of approval upon hearing the verdict. (App. 89a).

C. THE SENTENCE PROCEEDINGS

Under the applicable state law, the trial court judge rather than the jury was the actual sentencing authority, and the language in the jury's guilt stage verdict was "in no way binding on the trial court in the latter's role as the sentencing authority." Ritter v. State, 429 So.2d 928, 935-936 (Ala. 1983). Accordingly, the day after Ritter was convicted of the capital offense by the jury, a sentence hearing was held before the trial judge sitting without a jury. (Tr. 229-37) As the district court found:

> In addition to the evidence which was presented during the guilt stage of the trial, at the sentencing hearing the State introduced the following: The Grand Jury testimony of petitioner and

> Evans; petitioner's prior record; an additional lengthy confession petitioner gave the FBI which recounted his many criminal activities; a summary of the crime spree based on their statements to Mobile police officers; and a number of warrants received from other states indicating that they would attempt to extradite and prosecute petitioner if he was not sentenced to death in Alabama. All of this additional evidence was presented without objection. Petitioner submitted no evidence at the sentencing hearing.

(App. 89a - 90a) (citations to exhibits deleted). Ritter's attorney told the court: "Mr. Ritter says that he wants the record to stand as is." (Tr. 236-37)

After a short recess, the trial court entered a written sentence order finding that the aggravating circumstances present "far outweigh" the mitigating circumstances. (Tr. 246) It adjudged Ritter guilty of the capital offense of robbery-intentional killing and sentenced him to death. (Tr. 246-47) (App. 90a-92a).

## D. THE STATE APPELLATE COURT PROCEEDINGS AND FACTFINDINGS

Under Alabama law, a death sentence case is automatically appealed irrespective of the wishes of the defendant. Code of Alabama 1975, §13-11-5. The Court of Criminal Appeals affirmed Ritter's conviction and death sentence. Evans and Ritter v. State, 361 So.2d 654 (Ala.Cr.App. 1977). In doing so, the court found that Ritter had been well represented by his attorney who had repeatedly advised him against the self-destructive course he pursued at trial. Id., at 661-62. The state appellate court also stated:

> Additionally, this Court has weighed the various factors presented by this record, and is of the opinion that the punishment here imposed fits the crime for which each appellant has been found guilty thereof.
>
> A careful reading of this record convinces this Court that

> each appellant has here followed the course of action pursued at trial with full knowledge of its consequences. Further writing on this point would serve no worthwhile purpose. This Court is convinced that each appellant is sincere in seeking the death sentence, preferring this course to a long prison sentence.

Id., at 662.

The Alabama Supreme Court affirmed other aspects of the case but remanded it to the Court of Criminal Appeals for determination of whether a non-triggerman like Ritter could be sentenced to death. Evans and Ritter v. State, 361 So.2d 666 (Ala. 1978).[4]

On remand, the Court of Criminal Appeals again upheld Ritter's conviction even though he was not the actual triggerman. Ritter v. State, 375 So.2d 266 (Ala. Cr.App. 1978). The court explained that the felony

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[4]It was some time after that decision that Ritter changed his mind and decided he did not want to be executed after all.

murder doctrine had not been applied, and the evidence had proven that Ritter had the necessary intent to kill, because it was "really simply a matter of logistics that Ritter did not also fire his weapon." Id., at 267. The court also reweighed the aggravating and mitigating circumstances and reaffirmed the death sentence. Id.

The Alabama Supreme Court affirmed that decision. Ritter v. State, 375 So.2d 270 (Ala. 1979). It held that Ritter, who "encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necesary," had possessed the requisite intent to kill. Id., at 273-75; It also held his death sentence was not disproportionate, because "[b]y Ritter's own statement it was mere fortuity which made John Evans the triggerman and not Ritter." Id., at 275.

In Ritter v. Alabama, 447 U.S. 625 (1980), this Court remanded the case back to the Alabama Supreme Court for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). There then followed a series of four more Alabama Supreme Court opinions and two more orders from this Court, the net effect of which was to establish that the Alabama Supreme Court thought Beck v. Alabama, supra, required reversal of Ritter's conviction until Hopper v. Evans, 456 U.S. 605 (1982), convinced it to the contrary.[5]

In its last decision in this case, Ritter v. State, 429 So.2d 928 (Ala. 1983), the Alabama Supreme Court stressed that "[t]he uniqueness of the facts of Ritter's case

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[5]This Court's orders and the Alabama Supreme Court's opinions are listed in that court's fourth and final opinion in the case, Ritter v. State, 429 So.2d 928, 931-932 (Ala. 1983).

merit particular emphasis," id., at 932, and it upheld his conviction and sentence. In rejecting Ritter's attack on the statutory sentencing procedures, the Court held that "in light of the particular facts in this case" those procedures were not prejudicial to Ritter, and he was therefore constitutionally sentenced. Id., at 935. Ritter did not seek to have this Court review that decision on certiorari, and chose instead to file a 28 U.S.C. §2254 proceeding.

## E. THE FEDERAL DISTRICT COURT PROCEEDINGS AND FACTFINDINGS

Ritter filed a habeas corpus petition with the United States District Court for the Southern District of Alabama. (R. 1-67) Included in it was a claim that the Alabama sentencing procedures in effect at the time of Ritter's trial were unconstitutional because of the statutory requirement that the

jury's verdict convicting a defendant of a capital offense contain formal language "fixing" his punishment at death, even though the trial judge was the actual sentencing authority. (R. 16-20)[6] The State, through its named respondents (petitioners here), filed an answer which denied that the sentencing provisions were unconstitutional, and further averred that: "even if there were some error or defect in the capital sentencing procedures used in [Ritter's] case, any such error or defect was harmless beyond a reasonable doubt." (R. 78-79)

An evidentiary hearing was held on the merits of the petition, and Ritter, his trial counsel, and others testified. (H.Tr. 1-326) The district court entered judgment denying

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[6]This was the same claim the Alabama Supreme Court had rejected "in light of the particular facts in this case." 429 So.2d at 935.

the habeas petition with prejudice (R. 184), and it issued a scholarly opinion containing detailed findings of fact and conclusions of law. Ritter v. Smith, 568 F.Supp. 1499 (S.D. Ala. 1983) (App. B).

The district court found as a fact that:

> The reason that [Ritter] is facing a death sentence is not the result of any peculiarities of the capital punishment statute under which he was tried. Rather, [Ritter] is facing a sentence of death as a result of his own criminal conduct and his having adopted a legal strategy, however unwise, which was adopted freely, knowingly, and voluntarily by [Ritter] himself for which no other person or factor is responsible. The Court cannot help but note that as [Ritter's trial attorney] testified at the evidentiary hearing, [Ritter] obtained exactly what he wanted.

(App. 85a - 86a). The district court agreed with the Alabama courts that the motivation behind Ritter's self-destructive strategy had been "his preference for death over a

long prison sentence or series of long prison sentences." (App. 81a - 82a)[7]

The district court noted that Ritter's sentence procedure claim "in the abstract, appears to be substantial" and that such a claim might be successful in a case "where the sentencing decision presented a close question." (App. 156a). The court nonetheless rejected the claim as applied to Ritter, upheld the validity of his sentence, and denied habeas relief to him. It did so because it found Ritter had not been harmed or prejudiced by the alleged defects in the sentence procedures and that any defect in them was harmless beyond a reasonable doubt in his case.

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[7]The district court found that the only other factor that may have contributed to Ritter's course of conduct was "his appetite for publicity and notoriety and his desire for news media attention." (App. 82a)

The district court found as a fact that: "[g]iven petitioner's unusual, even self-destructive behavior in front of the jury in which he threatened the jury and admitted his guilt, including making the statement that he would have shot Edward Nassar had Evans not done so, it is inconceivable that a jury would not have recommended the death penalty." (App. 150a - 151a) The court also found that:

> At the evidentiary hearing held in this habeas petition, petitioner's own trial counsel testified that in his opinion petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement had not existed. (Testimony of attorney Stephens at the evidentiary hearing.)
>
> Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing in this case this Court finds beyond a reasonable doubt that there is no evidence that petitioner was harmed or prejudiced in any way by the

> existence of the mandatory jury verdict form requirement or any other aspect of the sentencing procedure employed in this case.
>
> Based upon a careful examination of the state trial court record and consideration of the testimony presented at the evidentiary hearing, this Court finds beyond a reasonable doubt that petitioner would still have been sentenced to death even if the mandatory jury verdict form requirement and other aspects of the sentencing procedure about which he now complains had not been employed at his trial.
>
> Given the facts and circumstances of this case, including but not limited to the fact that the petitioner threatened to harm the jury if he was not sentenced to death, this Court finds beyond a reasonable doubt that no sentencing authority could reasonably have sentenced petitioner to anything other than death regardless of the sentencing procedure employed.

(App. 94a - 96a).

In addition to its harmless error holding, the district court held that Ritter was not entitled to relief because a habeas petitioner must plead and prove prejudice, and

habeas relief should be limited to cases involving "fundamental miscarriages of justice." (App. 159a). The court found that "the statute, as applied in this particular case, did not prejudice petitioner's rights, and conclude[d] beyond a reasonable doubt, his rights were not so prejudiced." (App. 158a) It further concluded that the claimed statutory defects "either singly or in combination, created no fundamental miscarriage of justice." (App. 159a - 160a)

Finally, the district court also held, as an additional independent basis for its decision, that this Court's decision in Alabama v. Evans, 103 S.Ct. 1736 (1983) (per curiam), foreclosed Ritter's sentence procedure claims, because in Evans this Court held that identical sentence procedure claims raised by Ritter's co-defendant had been "conclusively resolved in prior proceedings." (App. 149a - 150a)

## F. THE FEDERAL APPEALS COURT DECISION AND HOLDINGS

The United States Court of Appeals for the Eleventh Circuit (per Judges Johnson, Anderson and Tuttle), reversed the district court decision insofar as the sentence was concerned and ordered the writ to issue overturning the death sentence. Ritter v. Smith, 726 F.2d 1505 (1984). (App. A) The appeals court held that this Court's decision in Alabama v. Evans, 103 S.Ct. 1736 (1983), was not binding on it because that decision was not "on the merits." (App. 22a, 51a - 52a)

The appeals court also held that a habeas petitioner could challenge a state statute on its face, even if it did not operate to harm him, and in such a case could claim the benefit of any unconstitutional effect the statute might have in

another case. (App. 58a). Acting pursuant to the license it had granted itself, the court held "the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional." (App. 39a)

The federal appeals court did not disturb the district court's extensive findings that any defect in the sentence procedures was harmless beyond a reasonable doubt in Ritter's case because of the extraordinary course of action he pursued before and during trial. Instead, the court held that the harmless error rule was totally inapplicable and that reversal of the sentence was required no matter how harmless the procedural errors were in this specific case. (App. 39a - 47a). It interpreted Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), to forbid application of the harmless error rule to

any error involving injection of "a constitutionally impermissible and irrelevant consideration into the sentencer's exercise of that discretion in determining whether to impose a sentence of death." (App. 45a - 46a).

## REASONS FOR GRANTING THE WRIT

This case involves an unprecedented decision. No federal appeals court has ever before expanded the scope of 28 U.S.C. §2254 proceedings to encompass facial attacks on state statutes, thereby permitting a habeas petitioner to invoke the possible operation of the statute in some other case to invalidate the otherwise valid judgment in his own case. Nor has any other court interpreted this Court's decisions to absolutely bar application of the harmless error rule to certain types of capital sentencing defects,

regardless of the facts and circumstances. The Eleventh Circuit Court of Appeals did both those things in this case. It also misconstrued Alabama v. Evans, 103 S.Ct. 1736 (1983), which involved respondent's co-defendant, and it struck down a state statutory provision which had been upheld by the Alabama Supreme Court. The reasons for granting the writ are several.

## I. THE HOLDING THAT FACIAL ATTACKS ON STATE STATUTES ARE COGNIZABLE IN FEDERAL HABEAS PROCEEDINGS CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT AND WILL HAVE SERIOUS REPERCUSSIONS

In the district court, Ritter downplayed the facts of his own case and launched a facial attack on the sentencing provisions of Alabama's pre-Beck v. Alabama, 447 U.S. 625 (1980), capital punishment statute. The district court recognized that

the claim that those provisions were unconstitutional appeared to be substantial "in the abstract" and that they "might in some circumstances prejudice a defendant where the sentencing decision presented a close question." (App. 156a) It nonetheless rejected the facial attack approach and held that federal habeas relief should be limited to cases involving fundamental miscarriages of justice, a limitation which requires the petitioner to plead and prove prejudice from any real or imagined constitutional defect. (App. 159a)

After carefully examining the unusual facts and circumstances of Ritter's case, see pp. 4 - 16, supra, and after hearing evidence on the issue, the district court denied the writ because:

> the Court finds that the statute, as applied in this particular case, did not prejudice petitioner's rights, and concludes

> that, beyond a reasonable doubt his rights were not so prejudiced.

(App. 158a) (emphasis in original). That conclusion was based on express factfindings that: Ritter would still have been sentenced to death even if the procedural defects he complained of had not existed; no sentencing authority could reasonably have sentenced him to anything other than death regardless of the procedures employed; and it is utterly inconceivable that the jury at Ritter's trial would have reached any other conclusion. (App. 94a - 96a, 150a - 151a) The court found each of those factfindings beyond a reasonable doubt. (App. 95a - 96a, 150a - 151a)[8]

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[8]Indeed, Ritter's own trial counsel testified that Ritter would still have been sentenced to death if the claimed defect had not existed. (App. 94a)

The federal appeals court did not overturn any of those factfindings, nor did it question the conclusion that the statute was not unconstitutional as applied. Instead, it held that the district court erred in judging the statute only as applied in Ritter's case. Treating the proceeding like a declaratory judgment action, the appeals court held the statute facially unconstitutional. (App. 39a). It said:

> because the petitioner challenges the statute on its face and not as applied to him, the influence of the constitutionally impermissible factor of the jury's mandatory death sentence on the judge's sentencing determination in a close case requires a finding of facial unconstitutionality.

(App. 58a) The court went on to hold that since in its opinion the harmless error rule was inapplicable, see pp. 43 - 53, infra, the facial unconstitutionality of the statute required that Ritter's sentence be set aside. (App. 39a - 47a)

The issue of whether facial attacks on state statutes are cognizable in 28 U.S.C. §2254 proceedings could not be presented any more clearly, because the court of appeals left undisturbed the district court's holding that the statute was not unconstitutional as applied in Ritter's particular case. His sentence was set aside solely because of the effect the statute might have in some other case. The appeals court decision should be reversed, because it is contrary to controlling decisions of this Court both on standing in general and on the scope of federal habeas review in particular, as is discussed below.

## A. The Constitutional Adjudication Standing Decisions

This Court has repeatedly held that, except in the First Amendment area, a federal court lacks the authority to entertain

a facial attack on a state statute. In Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), this court explained that: "[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." That fundamental rule of law was recognized and applied in United States v. Raines, 362 U.S. 17, 21 (1960), and was reiterated in New York v. Ferber, 458 U.S. 747, 767-768 (1982), and Murphy v. Hunt, 455 U.S. 478, 481-482 n. 5 (1982).

The rule is based on Article III jurisdictional restrictions as well as important prudential restraints. E.g., New York v.

Ferber, 458 U.S. at 767-768 & n. 20 (1982); United States v. Raines, 362 U.S. at 21. Because of such limitations, the bottom line of this Court's decisions is that: "if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." Ulster County Court v. Allen, 442 U.S. 140, 155 (1979). The decision below changes that. Under it, a litigant may gain relief based upon the effect a statute has in some other case regardless of how it operates in his own case.

B. The Federal Habeas Decisions

The fact that this case involves a 28 U.S.C. §2254 proceeding compounds the error of the decision below, because:

> it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. ...

Barefoot v. Estelle, 103 S.Ct. 3383, 3391 (1983). Accord, e.g., Engle v. Isaac, 456 U.S. 107, 134-135 (1982) ("the burden of justifying federal habeas relief for state prisoners is 'greater than the showing required to establish plain error on direct appeal.'"). The holding below that facial attacks on state statutes are cognizable in habeas proceedings and that ordinary standing restraints are inapplicable is

fundamentally inconsistent with any notion that habeas review is "secondary and limited."

The holding also flies in the face of the well-recognized doctrine that because of society's interest in the finality of judgments, a showing of prejudice is a threshold requirement for collateral relief. See, e.g., United States v. Frady, 456 U.S. 152, 175 (1982); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Hutchins v. Garrison, 724 F.2d 1425, 1434 (4th Cir. 1983) (capital case); Stanley v. Zant, 697 F.2d 955, 972 (11th Cir. 1983) (capital case); Ross v. Hopper, 716 F.2d 1528, 1540 (11th Cir. 1983) (capital case). It simply makes no sense to say that a habeas petitioner must prove that he was prejudiced by a claimed defect, and to also say he can attack a

statute on its face irrespective of how it operated in this case.

Moreover, the decision below is flatly contrary to this Court's decision in Jaehne v. New York, 128 U.S. 189 (1888). In Jaehne this Court held that even if a state statute might apply unconstitutionally in some other case, a petitioner to whom the statute was not unconstitutionally applied was entitled to no federal habeas relief. Id., at 189. That decision has never been overruled, and its principle has been honored in other circuits. E.g., Hutchins v. Garrison, 724 F.2d 1425, 1431 (4th Cir. 1983) (capital habeas case) ("the petitioner cannot rely on the rights of third parties"). The Jaehne doctrine was not honored by the appeals court in this case.

Not only is the decision below clearly wrong, it will also have deleterious effects

on our system of federalism. "Federal habeas has been a source of friction between state and federal courts," Sumner v. Mata, 449 U.S. 539, 550 (1981), and expansion of the writ "inflicts substantial costs on society, our system of justice and our federal fabric," Rose v. Mitchell, 443 U.S. 545, 585-586 (1979) (Powell, J., concurring). In Engle v. Isaac, 456 U.S. 107 (1982), this Court listed the significant costs federal habeas review of state court judgments entails, id., at 126-128, and indicated that habeas relief should be limited to instances involving a fundamental miscarriage of justice, id., at 135. Accord, Powell, Honorable Lewis F., Speech To Eleventh Circuit Conference (May 1983), at 7. The district court relied on that indication in this case. (App. 159a - 160a). The appeals court disregarded it.

By incorporating what amounts to a declaratory judgment cause of action into the fabric of habeas corpus law, the decision below has expanded significantly the scope of such review and the costs entailed for our society. Moreover, unless corrected by this Court, the decision will mark the beginning of a trend away from the restrictions on habeas review which this Court has labored to establish in recent years. As Mr. Justice Blackmun has reminded us, "[a] trend of this kind, once begun, easily assumes startling proportions." Braden v. Judicial Circuit Court of Kentucky, 410 U.S. 484, 501 (1973) (concurring opinion).

## II. THE HOLDING THAT ZANT v. STEPHENS, 103 S.Ct. 2733 (1983), AND LOCKETT v. OHIO, 438 U.S. 586 (1978), ABSOLUTELY BAR APPLICATION OF THE HARMLESS ERROR RULE TO CERTAIN TYPES OF CAPITAL SENTENCING DEFECTS IS A SERIOUS MISINTERPRETATION INVOLVING AN IMPORTANT QUESTION OF LAW

The second independent basis for certiorari in this case is the harmless error holding below. The extraordinary facts of this case which make any sentence other than death utterly inconceivable are set out on pp. 4 - 16, supra. After carefully reviewing those facts and hearing testimony on the issue, the district court found beyond a reasonable doubt that: there is no evidence Ritter was harmed or prejudiced by the claimed defects in the sentencing procedures; he would still have been sentenced to death even if the claimed defects had not existed; and "no sentencing authority could

reasonably have sentenced petitioner to anything other than death regardless of the sentencing procedures employed." See pp. 25 - 26, supra. Applying this Court's decisions, the district court concluded that even if the statutory sentencing procedures were unconstitutional, the error or defect was harmless beyond a reasonable doubt in this unusual case. (App. 145a - 151a, 158a - 160a)

The court of appeals did not disturb the district court's factfindings or its conclusion that any error or defect was harmless. Instead, it concluded that the harmless error rule was inapplicable and Ritter's sentence was due to be set aside regardless of the facts. The court held Zant v. Stephens, 103 S.Ct. 2733 (1983), and Lockett v. Ohio, 438 U.S. 586 (1978), absolutely forbid application of the harmless

error rule to facial defects in capital sentencing provisions if those defects inject constitutionally impermissible or irrelevant considerations into the sentencing decision. (App. 39a - 47a) That decision is wrong for four independently adequate reasons.

First, Zant did not hold that the interjection of constitutionally impermissible or irrelevant considerations into the sentencing process can never be harmless error. Zant held that the harmless error doctrine was applicable to the use of unconstitutional aggravating circumstances at a capital sentence proceeding, see, Barclay v. Florida, 103 S.Ct. 3418, 3425 n. 8 (1983), but it did not hold that the doctrine was inapplicable to other types of constitutional defects in sentencing.

This Court did say in dictum that if Georgia had "attached the 'aggravating'

label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process" due process would require that the death sentence be set aside. Zant v. Stephens, 103 S.Ct. at 2747. But even that dictum, which the court of appeals seized upon, is not applicable here because there is no suggestion that any of Alabama's eight aggravating circumstances (App. 212a - 213a) are constitutionally impermissible or totally irrelevant. The four aggravating circumstances found by the trial judge to "far outweigh" any mitigating circumstances in this case (App. 90a - 91a) are all constitutionally proper.

Moreover, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and broad language from an earlier decision involving different facts is not

controlling. Zenith Radio Corp. v. United States, 437 U.S. 443, 459-462 (1972); accord, e.g., Hopper v. Evans, 456 U.S. 605, 610 (1982).

The court of appeals' reliance on Lockett v. Ohio, supra, is even more misplaced. Evidence of character, record, and circumstances of the offense was excluded from sentencing in that case involving a 21 year-old offender with a relatively good prior record who lacked the intent to kill. The harmless error rule was not even mentioned in Lockett, because the exclusion, if error, was clearly not harmless in that case. Ohio did not even argue to the contrary.

The second reason the harmless error holding below is wrong is that it is contrary to Hopper v. Evans, 456 U.S. 605 (1982). In Beck v. Alabama, 447 U.S. 625

(1980), this Court held the preclusion clause in Alabama's capital statute unconstitutional because it interjected irrelevant considerations into the decision making process thereby introducing a constitutionally intolerable level of uncertainty and unreliability, id., at 642-643. Nonetheless, in Hopper v. Evans, supra, this Court applied the harmless error rule to that facial defect which involved irrelevant considerations interjected into the decision making process.

The court of appeals' attempt to distinguish Hopper v. Evans, because it involved facial defects affecting the guilt stage rather than the sentence stage (App. 58a - 59a) is unconvincing at best. This Court held in Beck that the same rules apply to defects in capital guilt stage procedures that apply to the sentencing stage. 447

U.S. at 638. That makes eminently good sense, because no one can be sentenced to death without first being convicted of a capital offense. Indeed, if there is to be any difference in the doctrines applicable to the two stages of a capital trial, the court of appeals has it upside down, because "in general sentencing decisions are accorded far greater finality than convictions." Zant v. Stephens, 103 S.Ct. at 2755 (Rehnquist, J., concurring).[9]

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[9]The court of appeals citation of Ramos v. California, 103 S.Ct. 3446, 3456-57 (1983), for the proposition that there is a "fundamental difference" between the two stages of a capital trial (App. 59a) is a non sequitur. Ramos says the difference is that the guilt stage involves a central issue while the sentence stage involves a myriad of factors and countless considerations, id., which makes it less likely that the attention of the sentencing authority would be diverted from its proper role by injection of an irrelevant factor. Therefore, if Ramos indicates anything on the subject, it indicates that the harmless error rule is even more appropriate for the sentence stage than the guilt stage.

The third reason the decision below is wrong is that it is contrary to Wainwright v. Goode, 104 S.Ct. 378, 383 (1983), which held that capital sentencing error at the trial level could be rendered harmless by independent appellate review of the death sentence. See also, Zant v. Stephens, 103 S.Ct. at 2749. In this case the Alabama Court of Criminal Appeals twice independently weighed the aggravating and mitigating circumstances and upheld the propriety of Ritter's sentence. Evans and Ritter v. State, 361 So.2d 654, 662 (Ala.Cr.App. 1977); Ritter v. State, 375 So.2d 266, 268 (Ala.Cr.App. 1978). That appellate review, which the court below did not even consider, rendered any defect in the trial stage sentencing procedures harmless.

The fourth reason the decision below is wrong is that it simply does not make sense.

It cannot be overemphasized that the court of appeals left intact the district court's findings beyond a reasonable doubt that Ritter would still have been sentenced to death even if the claimed defects had not existed, and no sentencing authority could have reasonably sentenced him to anything else regardless of the procedures involved. Given those undisturbed factfindings there is simply no logical reason, short of a flanking opposition to the death penalty itself, to overturn the sentence in this case. This is precisely the type of extreme fact situation in which the harmless error rule should operate.

The issue is worthy of review because the application of the harmless error to capital sentencing errors is important. As Chief Judge Godbold observed in Ford v. Strickland, 696 F.2d 804, 823 (11th Cir.

1983) (concurring opinion), given the fluidity of the constitutional doctrines in this area, absent an effective harmless error rule "the death sentencing process will become so time-consuming and cumbersome that the death penalty will be imposed rarely and freakishly in violation of Furman v. Georgia, 408 U.S. 238 (1972)." The harmless error rule is also important because it forces courts to focus on facts, and "[u]ltimately our rules, our justice is judged on the actual facts," O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983) (concurring opinion of Higginbotham, J.).

Moreover, the prior decisions of this Court "are not completely consistent regarding the effect of constitutional error in sentencing proceedings on the sentence imposed on the defendant." Zant v. Stephens, 103 S.Ct. at 2755 (Rehnquist, J.,

concurring). The remarkable clarity with which the issues are drawn in this case make it an ideal vehicle for this Court to review and reconcile the decisions in this important area of the law.

## III. THE HOLDING THAT THIS COURT'S DECISION IN ALABAMA v. EVANS, 103 S.Ct. 1736 (1983), IS NOT BINDING ON THE MERITS IS WRONG

The third separate basis for certiorari is that the decision below is in conflict with the decision this Court reached in the case of Ritter's co-defendant, John Louis Evans. Evans and Ritter were jointly tried and convicted by the same jury for the same crime and sentenced by the same judge under the same sentencing procedures. In Alabama v. Evans, 103 S.Ct. 1736 (1983), this Court vacated a stay of execution issued by the district court to permit it to consider claims which included precisely the same sentence procedure issues Ritter raised in

this case. See, Alabama v. Evans, supra, Petition for Writ of Habeas Corpus, at 7 - 10.[10]

In this case, the district court held as an additional basis for denying the writ that this Court's decision in Alabama v. Evans was controlling. (App. 149a - 150a) The court of appeals disagreed, saying both that it was not bound by decisions this Court renders in stay of execution proceedings (App. 22a, 52a), and that the Evans decision was not on the merits anyway (App. 22a - 27a). The court of appeals held, in effect, that Evans was unconstitutionally sentenced to death, but he was allowed to be executed by this Court because of his prior legal maneuvers.

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[10]The habeas petition and all other papers in the Evans case were requested by and submitted to this Court in Alabama v. Evans, supra.

While it is true that Alabama v. Evans involved a second habeas petition, this Court's opinion did not state that it acted under Habeas Rule 9(b) or because of abuse of the writ, those terms not even being mentioned in the opinion. Instead, this Court said that the sentence procedure issues involving Alabama's pre-Beck statute had been "conclusively resolved in prior proceedings." 103 S.Ct. at 1739. It also addressed in a manner which was clearly on the merits the only new issue Evans raised. Id., at 1738-39.

If the decision in Alabama v. Evans is not on the merits and not binding on lower courts, then the court of appeals decision should still be reviewed and reversed for the three other reasons stated in this petition. Those grounds of review are not dependent upon this one. On the other hand,

if this Court did in fact conclusively resolve the sentence procedure issues in Evans (on harmless error or other grounds), then the court of appeals decision should be reversed on that ground as well.

## IV. THE HOLDING THAT ALABAMA'S PRE-BECK SENTENCING PROCEDURES ARE UNCONSTITUTIONAL CONFLICTS WITH THE DECISION OF THE ALABAMA SUPREME COURT ON THE SAME ISSUE

### A. The Conflict

The fourth separate reason this case should be reviewed is that the court of appeals has decided a federal constitutional question in a way which squarely conflicts with the decision of the highest court of a state. In Ritter v. State, 429 So.2d 928, 933-37 (Ala. 1983), the Alabama Supreme Court upheld the constitutionality of the pre-Beck sentencing procedures in this very case. Its decision is the correct one.

B. The Merits of the Issue

While the statute involved is not a mandatory death penalty one, it did include a provision requiring every jury verdict form convicting a defendant of a capital offense to contain language "fix[ing] the punishment at death" (App. 204a), even though the actual sentencing decision was made later by the trial judge following a post-conviction sentence hearing (App. 209a - 211a). It was that provision which the court of appeals held rendered the statute unconstitutional.

In reaching an opposite conclusion, the Alabama Supreme Court explained that under state law "the trial court and not the jury is the sentencing authority," Ritter v. State, 429 So.2d at 936, and the purely formal language in every guilt stage verdict form "fixing" the penalty at death "is in no

way binding on the trial court in the latter's role as the sentencing authority," id., at 935. The Court further noted that the process included automatic two-tier appellate review, id., at 937, during which the aggravating and mitigating circumstances are independently weighed to ensure that death is the proper sentence. See pp. 17 and 19 of this petition, above.[11]

The court of appeals reasoning that the verdict form language is given weight in the trial judge's sentencing decision, and might in some cases be decisive, is flawed. As the court of appeals itself noted, that language "is simply a statutory consequence of the jury's finding of guilt of a capital offense, and reflects no consideration in

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[11]Alabama is apparently one of the very few states which provides automatic review of every death sentence case by both the intermediate appellate court and the state supreme court.

favor of imposing the death penalty in any particular case." (App. 36a) The implicit assumption is that the trial judges who actually applied the statute did not realize that. State trial court judges, who are at least as familiar with state law as federal appeals judges, are not as dense as the court of appeals assumes. Indeed, the district court specifically found that the trial judge in this case was not influenced in anyway by the verdict form language. (App. 156a - 158a) The death sentence was imposed because the trial court found the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. (App. 157a)

C. The Relationship of this Issue to the Other Issues

It is not necessary for this Court to even consider the facial constitutionality

of the pre-Beck sentencing provisions in order to review this case. The holding that a habeas petitioner can be granted relief on a facial unconstitutionality claim even when the statute is constitutional as applied to him, see pp. 31 - 42, supra, can be addressed without reaching the merits of the facial claim itself. Likewise, the holding that Zant v. Stephens, supra, and Lockett v. Ohio, supra, absolutely forbid application of the harmless error rule to certain types of capital sentencing defects, see pp. 43 - 53, supra, can be reviewed without determining whether there actually was such a defect. See, e.g., Milton v. Wainwright, 407 U.S. 371, 372 (1972)(question of whether there was any constitutional error by-passed by holding that error, if any, was harmless).

It is true that the court of appeals holding concerning the cognizability of facial defects in habeas proceedings and its holding concerning the harmless error rule will have the greatest impact and cause the most mischief if not corrected. Nonetheless, the conflict between the Eleventh Circuit Court of Appeals and the Alabama Supreme Court on the facial constitutionality claim also merits review.

There are nine other pre-Beck death sentence cases pending at various stages of the appellate process.[12] The Alabama Supreme Court has held that while it is bound by decisions of this Court on federal constitutional issues, it is not bound by decisions

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[12]All but ten pre-Beck cases have been retried under procedures promulgated in Beck v. State, 396 So.2d 645, 662-64 (Ala. 1980) (on remand), the constitutionality of which are not involved here.

of any federal appeals court. E.g., Ballew v. State, 292 Ala. 460, 296 So.2d 206, 210 (1974), cert. denied, 419 U.S. 1130 (1975); Sanders v. State, 278 Ala. 453, 179 So. 2d 35, 45 (1965). Accordingly, the Alabama Supreme Court will continue to affirm death sentences in the other nine pre-Beck cases, the Eleventh Circuit will continue to set them aside, and the conflict and ensuing friction will continue. That conflict and friction can and should be ended by the only court whose decisions bind both those courts.

## CONCLUSION

The petition for a writ of certiorari should be granted and the decision below summarily reversed. See, Wainwright v. Goode, 104 S.Ct. 378 (1983)(summarily reversing a court of appeals decision setting

aside a death sentence). In the alternative, the petition should be granted and the case set down for plenary review.

Respectfully submitted,

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